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No. 687

In the Supreme Court of the United States

OCTOBER TERM, 1952

JULIUS ROSENBERG AND ETHEL ROSENBERG,
PETITIONERS
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 329–337) is reported at 200 F. 2d 666. The opinion of the District Court (R. 8–30) is reported at 108 F. Supp. 798.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1952 (R. 338). The petition for a writ of certiorari was filed on March 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Whether a motion under 28 U. S. C. 2255 to vacate sentences for conspiracy to commit espionage was properly denied without a hearing where:

1. Petitioners' allegations as to the knowing use of perjured testimony at the trial constitute only renewed attacks on the credibility of witnesses.

2. Petitioners, who made no request for a change of venue or postponement of the trial, allege that they were denied a fair trial by reason of newspaper publicity resulting in "communal prejudgment" of their guilt.

3. Petitioners allege that some of the material, the transfer of which formed the basis of their convictions, was arbitrarily classified as secret.

STATUTE INVOLVED

Section 2255 of the Judicial Code, as amended, provides, in relevant part, that:

> A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. * * *

* * * * *

STATEMENT

On April 5, 1951, petitioners were convicted of conspiracy to commit espionage in time of war (R. 31). Both were sentenced to death (R. 31). The convictions were affirmed, and a petition for rehearing was denied by the Court of Appeals. *United States* v. *Rosenberg*, 195 F. 2d 583 (C. A. 2). A petition for a writ of certiorari was denied by this Court on October 13, 1952, 344 U. S. 838, and a petition for rehearing was denied on November 17, 1952, 344 U. S. 889 (Nos. 111–112).

On November 24, 1952, petitioners filed a motion in the United States District Court for the Southern District of New York, under Section 2255 of the Judicial Code, to set aside the judgment of conviction and sentence on grounds which may be summarized as follows (R. 30–128):

1. Pre-trial and trial publicity, bearing on the issues of petitioners' case, adversely reflected on their innocence, pre-conditioned the public mind in the Southern

District of New York to an acceptance of their guilt, and created a trial atmosphere of prejudice and hostility toward them, through:

a. Newspaper publicity developed by the independent initiative and private enterprise of the newspapers circulated within the Southern District of New York;

b. Information, indicating the guilt of petitioners, "fed to" the press and other mass media of communication circulated within the City of New York by the Federal Bureau of Investigation, the Department of Justice, the office of the United States Attorney for the Southern District of New York, and other officials of Government, and reported widely by said media of publicity;

c. The indictment of William Perl, procured by the prosecuting authorities in the Southern District of New York, in the course of petitioners' trial and before the verdict against them, and statements to the press in connection therewith, all having the effect of prejudicing the minds of the jurors sitting in petitioners' cause.

2. The prosecuting authorities knowingly used false testimony to bring about petitioners' convictions, as shown by the following facts:

a. Discrepancy between testimony by David Greenglass as to his early cooperation with the authorities and the statement by the United States Attorney, at the time of

Greenglass' sentencing, indicating less spontaneous cooperation;

b. Improbability that Greenglass could have reproduced from memory certain sketches introduced at the trial, particularly that showing a cross-section of the atom bomb, the inference being that he was improperly "coached" in connection therewith;

c. Discrepancy between the testimony of Ben Schneider, whose testimony indicated the Rosenbergs were planning to flee the country, that he had not seen the Rosenbergs between the time he took pictures of them and the date of his testimony, and the allegedly inconsistent fact that he had been brought to the court room the day before to verify his identification of the Rosenbergs.

3. Some of the material allegedly transferred was arbitrarily and capriciously classified as secret when in fact it was lawfully, widely, and publicly known, thus precluding its communication from being a violation of law.

The facts as to each of these questions are set forth at the appropriate point in the argument.

The District Court found that the files and records of the case and the papers and exhibits submitted on the motion conclusively showed that the petitioners were entitled to no relief (R. 8–30), and, on December 10, 1952, denied their motion (R. 5–6).

On appeal to the Court of Appeals for the Second Circuit, the order of dismissal was affirmed (R. 330–339). The present petition seeks to review this judgment.

ARGUMENT

One week after the petition for rehearing on their prior certiorari application was denied by this Court, petitioners filed the motion presently before the Court. Each of the principal questions now sought to be raised could have been presented during the course of the original trial or the appeal.[1] As we shall show, none of the petitioners' contentions have merit. But in any event, Section 2255 was not intended to permit defendants to prolong litigation by means of a new proceeding running from the district court through to this Court and raising no issues which could not have been previously presented. Furthermore, it is not the function of Section 2255 to provide a second appeal; the procedure was designed as the equivalent of habeas corpus and is subject to the same limitations with respect to the issues which are open to such a collateral attack. *United States* v. *Hayman*, 342 U. S. 205.

1. Petitioners contend that the United States Attorney knowingly used false testimony at the trial, with the consequence that they were deprived of a fair trial. Specifically, two in-

[1] The only exception is the question discussed in paragraph 1. a., *infra*, pp. 7–8.

stances of alleged false testimony by David Greenglass and one by Ben Schneider are relied upon.

Before referring to the specifications of perjury, it should be noted that the burden, in this aspect of the case, is on petitioners to show affirmatively "(1) that perjured testimony was used, [and] (2) that it was knowingly, wilfully and intentionally used by the prosecuting officers." *Ryles* v. *United States,* 198 F. 2d 199, 200 (C. A. 10); cf. *Mooney* v. *Holohan,* 294 U. S. 103, 112. By this test, it is clear that petitioners have not stated a case for relief. The present case is not at all similar on its facts to *Price* v. *Johnston,* 334 U. S. 266, or *Walker* v. *Johnston,* 312 U. S. 275, with which it is asserted by petitioners to be in conflict. The petitions and responses in those cases raised factual questions which could be resolved only by taking testimony. Here, although the factual assertions are in part denied, the basic question is the legal one of whether the credibility of witnesses may be retested on collateral attack.

a. Petitioners point out that Greenglass testified that on the night of his arrest he made a statement to the F. B. I. and that he did not withhold any facts (R. 78). They also refer to the fact that he denied instructing his lawyer "to fight this case" (R. 79). On the other hand, petitioners point to the fact that when Greenglass was sentenced on April 6, 1951, the day after petitioners were sentenced, the United States At-

torney stated to the court that Greenglass' counsel had protested Greenglass' innocence at the arraignment, and further stated that "Through Ruth Greenglass, his wife, came the subsequent recantation of those protestations, their representation and the disclosure of the facts by both of them" (R. 79). On the basis of this alleged discrepancy between the statements of the prosecutor and Greenglass' earlier testimony, petitioners argue that there was a knowing use of perjured testimony.

But Greenglass' testimony at the point referred to was not as specific as petitioners now assert; he stated that he was not sure as to certain matters which he thought he had included in his first statement, but which might have been included in later statements (Nos. 111–112, R. 577). The fact that fuller cooperation may have come from *both* Greenglass and his wife subsequent to the arraignment does not mean that Greenglass falsified the degree of his earlier cooperation; and it clearly does not mean that the United States Attorney knowingly participated in securing any such falsehood. Moreover, the answers in question were elicited on cross-examination by defense counsel. Obviously the United States Attorney neither elicited the statements nor relied upon them.[2]

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[2] In addition, we note that petitioners did not ask for production of the first statement, although Greenglass' hazy recollection of its contents might be said to have laid a foundation for such a request. See Nos. 111–112, R. 577–579.

b. The second allegation of knowing use of perjured testimony relates to Greenglass' testimony that, the day before he began to testify, he made from memory certain drawings of lens molds used several years before at Los Alamos in the atom-bomb project, and a cross-section sketch of an atomic bomb. Petitioners contend that it would have been impossible for someone of Greenglass' limited education to make these sketches at all, and certainly not from memory, that hence his testimony that he did so was false, and that the prosecution must have known it to be so.

But this contention cannot be the basis of a motion under § 2255. At the trial, petitioners, on cross-examination, had brought out the details of Greenglass' education (Nos. 111–112, R. 609–615), with the obvious purpose of persuading the jury that he had lied. In support of their renewed assertion of perjury, petitioners, on this § 2255 motion, presented the affidavits of four scientists who expressed the opinion that Greenglass, with his limited education as shown at the trial, could not have made the sketches (R. 113–123). But none of them claims to have known Greenglass. It follows that none was in a position to give an opinion about the quality of his abilities which, no matter what his education, may have been adequate for this purpose. Thus, what is phrased in terms of reliance by the Government on perjured testimony is in fact at best merely

a continuation of an attack on the credibility of a Government witness.

c. The third specification of allegedly perjured testimony relates to government rebuttal witness Schneider. He was a photographer. He testified that in May or June, 1950, Mr. and Mrs. Rosenberg and their two children came to his shop and had passport photographs taken. He was asked whether that was the last time he had seen Julius Rosenberg "before today," and he replied, "That's right." In fact he had been brought into the courtroom by an F. B. I. agent the day before he testified, and had at that time verified his previous identification of Rosenberg's picture.

Petitioners contend that the word "today" shows that the testimony was perjurious. But on cross-examination of Schneider at the trial, both court and counsel treated the question as meaning "before the trial" (No. 111–112, R. 1429, 1437). We think the court below was correct in its observation of this contention that "Judge Ryan [the district judge] was correct in ruling that there was not the slightest evidence that Schneider's testimony was intentionally false and that in any event it was on an immaterial point, *i. e.*, identification of the Rosenbergs as persons whose pictures he had taken, since the Rosenbergs had not denied that they might have gone to his shop for that purpose, although Julius

Rosenberg categorically insisted that they were not *passport* pictures." (R. 336.)

2. A preliminary and sufficient answer to the various aspects of petitioners' contention that they were unable to secure a fair trial because of a mass of adverse publicity, some of it allegedly inspired by the prosecution, is that they have waited too long to object. It is not the function of a motion under Section 2255 of the Judicial Code to repair alleged mistakes made during trial which could, with reasonable diligence, have been avoided or corrected either by the trial court itself or by the ordinary processes of direct review. Cf. *United States* v. *Riccardi*, 188 F. 2d 416 (C. A. 3); *Barnes* v. *Hunter*, 188 F. 2d 86 (C. A. 10); *Keto* v. *United States*, 189 F. 2d 247 (C. A. 8); *United States* v. *Walker*, 197 F. 2d 287, 288 (C. A. 2), certiorari denied, 344 U. S. 877; *Meyers* v. *United States*, 181 F. 2d 802 (C. A. D. C.)

The only excuse petitioners offered for their failure to raise this point before or during their trial is that the degree of hurt being imposed on them could not have been revealed to their counsel "by the usual sporadic reading of an average newspaper reader in New York City" (R. 152). There is no reason to assume that the jurors were more than "average newspaper readers". In any event, a pressure so lightly felt by defense counsel is hardly an adequate premise for the conclusion that a fair trial in the community was at that time impossible. Contrast *Moore* v.

Dempsey, 261 U. S. 86. In addition, whatever the limitations under which counsel for petitioners worked, motions for change of venue, for continuance, for mistrial, or for precautionary instructions are far too familiar a part of the trial lawyer's arsenal for petitioners now to contend that they failed before and during the trial to look for the factual conditions which underlie such motions. Even on the assumption that trial prejudice, "communal prejudgment", can be seen in clearer relief from a distance, nonetheless, on petitioners' argument, the community atmosphere must have reached the critical point of prejudice long before the opportunity to use normal remedies had passed.

For this reason, there is no conflict between the decision below and that of the Court of Appeals for the First Circuit in *Delaney* v. *United States*, 199 F. 2d 107. In that case, the unfavorable publicity occurred practically on the eve of the trial, whereas in the present case, it came principally at the time of petitioners' arrests, some 6 or 7 months before trial. Moreover, the publicity in that case was generated by a Congressional committee after Delaney's indictment in hearings which were, in substantial measure, a rehearsal of what was presented at the trial, with the disclosure, in addition, of matters not admitted or admissible in evidence at the trial. But even more significantly, *Delaney* represents a ruling, not on collateral attack, but on direct appellate review of a conviction,

as to the limits of a trial judge's discretion to refuse a timely request to mitigate the effects of a barrage of unfavorable publicity.

a. But even if it were assumed that petitioners' challenge on this score has not come too late, it still does not state a basis for relief. The clippings submitted by petitioners cover a period from February 1, 1950, to April 3, 1951.[3] The great bulk related to atomic espionage generally and had no specific reference to the petitioners. Nothing with specific reference to petitioners appeared until the time of their arrest. Julius Rosenberg was arrested July 17, Ethel Rosenberg, August 11, and Morton Sobell, their co-defendant, August 18, 1950. Their trial began March 6, 1951, and ended March 29. There was considerable newspaper comment when they were arrested. During September, October and November of 1950, newspaper references to the case were few and brief. From November, 1950, until February 21, 1951, which was approximately two weeks prior to the beginning of the trial, there were no news items at all about the case. During the following week, the publicity was negligible. During the week immediately preceding the trial and while the trial was in progress, there was the volume of publicity which normally accompanies a trial of public importance (R. 12, 128A).

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[3] These clippings are Exhibits II to XV. They have not been printed, but are part of the record and are on file with the Clerk.

Moreover, in spite of the fact that no question concerning unfavorable pretrial publicity had been raised by the defendants, the trial court was careful in its *voir dire* examination to ferret out any hidden feelings of prospective jurors resulting from anything they had read, seen, or heard about the case, and to caution them against any future influences of this sort. This action served the dual purpose of weeding out the prejudiced and of getting across again and again to those who ultimately served the fundamental proposition that the case must be decided solely on the evidence presented in court. Cf. *United States* v. *Moran,* 194 F. 2d 623 (C. A. 2), certiorari denied, 343 U. S. 965; *United States* v. *Leviton,* 193 F. 2d 848, 857 (C. A. 2), certiorari denied, 343 U. S. 946; *United States* v. *Weber,* 197 F. 2d 237, 238–239 (C. A. 2); certiorari denied, 344 U. S. 834.

Thus, the trial record shows that jurors were repeatedly excused, either because they had some preconceived notions about the case (Nos. 111–112, R. 64, 135), or about capital punishment (*id.,* 58, 97), or some bias which they thought would have prevented them from deciding the issues on the evidence presented (*id.,* 57, 78; cf. *id.,* 63). Again and again, bases of possible bias were voluntarily disclosed by jurors who were permitted by the court to remain as jurors after assurances that they would not affect their ability to decide the case on the evidence presented in

court (*id.*, 56, 60, 61, 77, 102). Jurors were specifically questioned as to newspapers (*id.*, 63, 67–68) and columnists they read (*id.*, 71, 124), commentators they heard (*id.*, 71, 124), and Congressional Reports they may have seen (*id.*, 74). Significantly, when counsel for the Rosenbergs propounded additional questions for the prospective jurors after the court had concluded its interrogation, not once did he raise any question as to newspaper publicity concerning the case or the subject matter of the trial (*id.*, 85–90, 124), although one prospective juror had specifically pointed out that he had been so prejudiced by various newspaper accounts of the case that he did not feel he should serve (*id.*, 135).

In addition, immediately after the jurors were sworn, the trial judge very carefully admonished them, as he had done earlier (*id.*, 114), and as he did throughout the trial (*id.*, 114, 194, 847), not to read anything that was published concerning the case. Specifically, he stated (*id.*, 153):

> * * * I admonish you now and I ask you to carry it with you at all times throughout this trial, not to discuss it with your fellow jurors, not to discuss it with anybody at home, not to discuss it with anybody, not to permit anybody to discuss the case with you, and, of course, not to read a newspaper, read anything in a news-

> paper concerning this case, not to listen to the radio, not to watch television, at no time to read any magazine that deals with this particular case.

There is no indication that the trial court's careful and continued effort to make clear to the jury that the case must be decided on the evidence in court, begun, as outlined, in the *voir dire* examination, and consistently maintained throughout the trial and charge (*id.*, 1543, 1552), and thus to dissipate prejudicial influences, was not adequate in this case.[4] Indeed, petitioners themselves made no offer to show that any juror was in any way improperly influenced.

b. Petitioners contend that statements and releases made by various officers of the Government as to aspects of the case had the dual effect of provoking independent newspaper embellishment of the stories (R. 69) and of validating in the public view the nature and seriousness of the charges (cf. Hoover statement at R. 68). But it is clear that these statements were few in number and, moreover, were simply a

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[4] There is no similarity between this case and the situations presented in cases like *Moore* v. *Dempsey*, 261 U. S. 86, or *Shepherd* v. *Florida*, 341 U. S. 50. In those cases, dealing with relatively small communities, it appeared that jurors who should vote for acquittal would risk mob violence. No suggestion could be made here of anything approaching such danger. Instead, petitioners devote their entire appendix to an attempt to demonstrate that public opinion has been molded subconsciously, as it were, so that only experts, e. g. social psychologists, can see the result.

method of answering the legitimate questions of the press. It is equally clear that they were factual and descriptive, which was proper, rather than provocative or inflammatory (see, e. g., R. 37, 39, 43–44, 66–67). And there is no reason to suppose that they had an impact on petitioners' trial. Indeed, with minor exceptions which certainly had no quantitative significance, most of what was said directly about petitioners, and attributed to the prosecutors, was subsequently proved. Cf. *Stroble* v. *California*, 343 U. S. 181.

c. In this connection, petitioners also complain specifically that the filing of an indictment against, and the arrest of, William Perl were deliberately timed by the prosecution to provide an occasion during their trial for publicity unfavorable to them. They ask that this inference of deliberate action be drawn from the fact that Perl's indictment for perjury related to his knowledge of petitioners and was based on grand jury testimony given by him in August and September of 1950, at least six months before his indictment, and from the further fact that Perl has not yet been brought to trial on the indictment. In addition, petitioners call attention to the fact that on the date that the Perl indictment was made public, the New York *Times* carried a statement ascribed to the then United States Attorney, as follows (R. 74):

> Mr. Saypol said that Perl had been listed by the Government as a prosecution witness

> in the current espionage trial. His special role on the stand, Mr. Saypol added, was to corroborate certain statements made by David Greenglass and the latter's wife, who are key Government witnesses at the trial.

At the time, Mrs. Greenglass was on the stand (R. 74).

But again, the short answer is that petitioners have waited too long. Moreover, they deliberately concluded during the trial not to ask for relief on this point. As the Court of Appeals said, "This was their deliberate choice after conferring with the judge out of the presence of the jury" (R. 334). The matter was specifically called to the trial court's attention, and then not pressed (R. 155). Although petitioners now say that they did not move for a mistrial because of assurances by the United States Attorney that the Perl indictment was not timed deliberately (R. 155), assurances which they now say were false, the fact remains that their only basis for complaint would be that the incident prejudicially affected the jury. As to this, the *mala fides* of the prosecution, even if it had existed, is irrelevant, and the conclusion of the defense at the time that the matter did not warrant a motion for a mistrial indicates their evaluation of the incident at the time when prejudice might have occurred. Indeed, even at the close of the trial, petitioners do not appear to have requested the trial judge

to "caution the jury not to be influenced by anything seen in the newspapers." Cf. *United States* v. *Weber,* 197 F. 2d 237, 239 (C. A. 2), certiorari denied, 344 U. S. 834. See opinion below (R. 334). There is not the slightest indication that any of the trial jurors read of the indictment or arrest of Perl, or that it came to their attention in any manner. The alleged misbehavior is not itself a basis for collateral attack. Cf. *United States* v. *Mitchell,* 322 U. S. 65, 70–71.

3. Petitioners assert that some of the material which was transmitted to the Soviet Union pursuant to the conspiracy was not properly classified as secret, and, accordingly, no crime was committed. The contention is plainly insufficient to support the relief they seek. Even if no information had in fact been transmitted, petitioners' convictions for *conspiracy* would have been proper.

Beyond this, petitioners' moving papers deal with the propriety of the classification of only one of many items of classified information which were transmitted to the Soviet Union pursuant to the conspiracy (R. 87–112). Assuming, *arguendo,* that this one time item, concerning the high explosive lens, was in fact a matter of public knowledge, it is still undisputed that other information which the evidence showed was transmitted properly fell within the highest security classification. This includes the security regula-

tions at Los Alamos, the physical layout of the project, the names of scientists working there, and the cross-section sketch of the atom bomb, together with accompanying descriptive material.

Moreover, with regard to the one item which petitioners seriously questioned, they offered no evidence that this particular device was known in the Soviet Union or elsewhere, no evidence that the feasibility of the use of a high explosive lens in an atomic weapon was public information, and certainly they presented no evidence that the United States Government had information which should have led it to believe that the device was well known. Indeed, at the trial, petitioners conceded that this device, as well as all information relating to the Los Alamos project, was secret. In this connection, counsel who made the present motion on behalf of the Rosenbergs stated (Nos. 111–112, R. 883):

> There is no dispute that the Los Alamos project was a restricted and secret project and we have the injunctions laid down for the various employees working around that project * * * and I can tell the Court I do not intend to dispute * * * the secrecy of the project. Anything connected with Los Alamos was secret and restricted, even the names of the persons who were working there.

This concession was supported by the testimony of the scientist who was directly in charge of high

explosive lens research at Los Alamos (Nos. 111–112, R. 466–486).

In their petition for certiorari, petitioners contend that the court below misunderstood their position and treated their showing, as we have done, as if it related only to data on lens molds, whereas in fact, it related more broadly to all the data about the bomb itself. As we read their moving papers on this point in the district court, they in fact seem to relate only to the "secret of the detonating mechanism" (R. 90), which, as we understand it, is related to the lens mold data transmitted by Greenglass. But even if we have misread petitioners' long and scientifically detailed showing in their moving papers, we still think the argument lacks merit. For if their suggestion is that data such as a cross-section of the atomic bomb was arbitrarily and capriciously classified as secret, then their petition is plainly frivolous.

Finally, it is apparent that there is here no parallel with the *Heine* case where data was held not to be secret because the Government itself had published the very data involved. *United States* v. *Heine*, 151 F. 2d 813 (C. A. 2).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

On February 17, 1953, the Court of Appeals recalled its mandate and stayed "issuance of same

and execution of the judgments of conviction * * * pending the determination of said application for a writ of certiorari by the Supreme Court of the United States on condition that said application for a writ of certiorari be perfected on or before March 30, 1953." However, the court added the further provision that if the petition for a writ of certiorari should be filed on or before March 30, "the stay above granted shall continue until otherwise ordered by the Supreme Court of the United States." Since the condition of this latter provision has been fulfilled by the filing of the petition on March 30, the stay granted by the Court of Appeals will continue pending the order of this Court. We therefore respectfully suggest that if this Court denies the petition for a writ of certiorari, as we contend it should, it would be appropriate at the same time to vacate or terminate the stay.

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